United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UHS OF DENVER, INC., DBA HIGHLANDS BEHAVIORAL HEALTH SYSTEMS, Respondent.	OSHRC DOCKET NO.: 19-0550

Appearances:

Alicia A. W. Truman and Beau Ellis, Department of Labor, Office of Solicitor, Denver, Colorado,
For Complainant

Melanie L. Paul and Dion Y. Kohler, Jackson Lewis, P.C., Atlanta, Georgia,
For Respondent

Before: Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. Introduction

The Commission has remanded the above-captioned case for the Court to determine a discrete issue: Whether the Secretary, based on record established at the trial held on June 7, 2021 to July 8, 2021,[1] proved her proposed abatement methods were economically feasible.[2] At the outset, it is important to note the existing record lacks any evidence as to what Complainant's

1. The trial did not officially conclude on June 23, 2021. Two additional days of testimony were taken via video teleconference on July 7–8, 2021.
2. The ALJ who originally issued the decision retired shortly after issuing the underlying decision, which is why the case was remanded to this Court. In the original trial decision, the ALJ that decided this case found Complainant established economic feasibility through the imposition of a discovery sanction. The Commission found the ALJ erred in imposing the sanction and remanded for consideration of whether the existing record established a violation.

proposed abatement measures would cost. Likewise, there is no evidence of Respondent's ability to pay for them. Nevertheless, Complainant contends there are alternative bases upon which economic feasibility can be determined within the existing record. Thus, the Court must determine whether the law permits a finding of economic feasibility on some basis other than cost and ability to pay. If so, the Court must also determine whether the evidence presented by Complainant is sufficient to establish economic feasibility under one of the alternative bases.

Based on its review of the existing record, as well as the relevant case law, the Court AFFIRMS the Citation and Notification of Penalty alleging a violation of the general duty clause. However, as will be discussed in more detail below, the Court also finds Complainant failed to establish the economic feasibility of two forms of abatement: additional staffing and a dedicated security staff.

II. Preliminary Issues

The Commission recently issued a handful of decisions that present a unique problem: When multiple forms of abatement are alleged as a process, there is tension between what is required to prove a violation of the general duty clause and the need to provide guidance to the community whose work practices Complainant seeks to regulate. *See, e.g., Pepperidge Farm Inc.*, 17 BNA OSHC 1993, 2034 (No. 89-0265, 1997) (approving of the Secretary's process approach to abatement of the hazard).

When multiple forms of abatement are alleged as part of a process, proof of the feasibility of any individual abatement proposal is sufficient to affirm a violation of the general duty clause. *See UHS of Westwood Pembroke, Inc., UHS of Delaware, Inc.*, No. 17-0737, 2022 WL 774272 at *8 (OSHRC, March 3, 2022) *aff'd,* No. 22-1845, 2023 WL 3243988 (3d Cir. May 4, 2023) (unpublished). In *UHS of Westwood*, the Commission affirmed the ALJ's determination that the employer violated the general duty clause; however, in so doing, the Commission only reviewed

the feasibility of some of the abatement proposals. *Id.* Because it could affirm based on any individual proposal, the Commission did not address the remaining abatement measures. *Id.* In a subsequent *UHS* case, Commissioner Laihow captured the tension described above. Although she concurred in the judgment affirming a violation of the general duty clause, Commissioner Laihow expressed concern that the feasibility of each abatement proposal alleged to be part of an abatement *process* was not addressed. *See UHS of Delaware, Inc. and Premier Behavioral Health Solutions of Florida, Inc. d/b/a Suncoast Behavioral Health Center*, No. 18-0731, 2023 WL 2388069 at *11 (OSHRC, Feb. 28, 2023) ("[I]n my view, it is important for the Commission to ensure that proposed abatement measures, such as the ones in this case, are properly vetted—i.e., that the Commission assesses their feasibility and effectiveness.") (Laihow, Comm'r., concurring). The same tension exists in this case.

Although not mandatory precedent, the Court finds Commissioner Laihow's concurrence provides insightful guidance as to how abatement proposals, characterized as a process, should be addressed. Indeed, if the Commission does not properly "vet" a handful of abatement proposals as part of a larger process, the employer could be left wondering which of the abatement proposals is affirmed as a final order of the Commission. This is particularly important because, under Section 10(b) and 17(d) of the Act, an employer can be cited for failure to abate the hazard, which can subject them to $15,625 per day in penalties. *See* 29 U.S.C. §§ 659(b), 666(d); *see also* 88 Fed. Reg. 2210, 2220 (Jan 13, 2023) (annual adjustment of penalties). Commissioner Laihow's concurrence also highlights an additional, albeit unstated concern: without a finding that a particular form of abatement is feasible, the Commission has ostensibly relieved the Secretary of its burden of proof as to that form of abatement. As in many of the UHS cases, it is easier to uphold an entire violation based on a paperwork abatement method versus a requirement to hire additional staff or make physical changes to the workplace, both of which require capital outlays. Given these

concerns, the Court shall address the question of economic feasibility as to each of the proposed forms of abatement.

III. Applicable Law

In order to address whether the Act permits a determination of economic feasibility on some basis other than cost and ability to pay, the Court will review how the Commission, as well as the circuit courts, have historically addressed this question.

A. History of Feasibility under the OSH Act

The Commission first addressed the question of feasibility in *Continental Can Co.*, No. 3973, 1976 WL 6188 (OSRHC, Aug. 24, 1976) (consolidated). At issue was the interpretation of the term "feasible" as it is used in 29 C.F.R. § 1910.95(b)(1), which is the occupational noise standard. The Commission determined a cost-benefit analysis was required "to effectuate the Congressional purposes underlying the Act . . . ." *Continental Can*, 1976 WL 6188, at * 6. This holding remained Commission precedent for roughly six years until the Supreme Court decided *American Textile Manufacturer's. Institute Inc. v. Donovan*, 452 U.S. 490 (1981) (*ATMI*). *See Sun Ship, Inc.*, No. 16118, 1982 WL 22716, *overruled, The Sherwin-Williams Co.*, No. 14131, 1984 WL 34904 (OSHRC, July 20, 1984).

In *ATMI*, employers challenged the promulgation of the cotton dust standard on the grounds of economic feasibility. The Supreme Court was tasked with ascertaining the meaning of "feasibility" as it is used in section 6(b)(5) of the Act, which addresses toxic substances. *See* 29 U.S.C. § 655(b)(5). Noting the Act did not define "feasibility", the Court reviewed the Act as a whole, as well as its legislative history, and determined Congress intended to accord the term its plain and ordinary meaning, which is "capable of being done". *See ATMI*, 452 U.S. at 508–509. In support of this finding, the Supreme Court stated:

> In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.

Id. at 509.

The next year, the Commission issued its decision in *Sun Ship, Inc.* In *Sun Ship*, the Commission overruled *Continental Can* and held the term "feasible" under § 1910.95(b)(1) did not require a cost-benefit analysis for the same reasons expressed by the Supreme Court. *See Sun Ship, Inc.*, No. 16118, 1982 WL 22716 at *4 (OSHRC, Dec. 17, 1982) (reasoning that "feasibility" under either section 6(b)(5) of the Act or under § 1910.95(b)(1) should be given its ordinary meaning because Congress did not give any indication it intended otherwise). *Id.* Instead, the Commission held that "administrative or engineering controls would be economically infeasible if their cost would seriously jeopardize the cited employer's long-term financial profitability and competitiveness." *Id.* at *5. The Tenth Circuit Court of Appeals also adopted this concept of feasibility in the context of a general duty clause violation.[3] *See Baroid Div. of NL Industries, Inc.*, 660 F.2d 439 (10th Cir. 1981) ("The Supreme Court recently has made clear that "feasible" for purposes of OSHA means economically and technologically capable of being done." (citing *ATMI*, 452 U.S. at 509)); *but see Donovan v. Castle & Cooke Foods*, 692 F.2d 641 (9th Cir. 1982) (crediting Commission's interpretation of feasibility to include a cost-benefit analysis in context of § 1910.95(b)(1) and finding *ATMI* not controlling for specific standards promulgated under section 3(8) of the Act).

3. The case at bar arose within the jurisdiction of the 10th Circuit. *See Kerns Bros. Tree Svc.*, No. 96-1719, 2000 WL 294514 at *4 (OSHRC, Mar. 6, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.").

Only two years after *Sun Ship*, when the Commission changed by one member, it changed course again and reinstituted the cost-benefit analysis of *Continental Can*. *See Sherwin-Williams Co.*, No. 14131, 1984 WL 34904 (OSHRC, June 20, 1984). In *Sherwin-Williams*, the Commission premised its return to cost-benefit on three bases: (1) *ATMI's* holding was limited to standards promulgated under section 6(b)(5) of the Act; (2) all circuit courts that have considered the cost-benefit analysis of *Continental Can* have upheld it; and (3) the Walsh-Healey Act, which was the source of the noise standard found at § 1910.95(b)(1), supports the holding of *Continental Can*. *See id.* at *4. A deeper dive into those bases, however, illustrates a results-driven analysis.

First, the Supreme Court's holding in *ATMI* is not as limited as the Commission in *Sherwin-Williams* believed it to be. The Court stated its discussion of feasibility was limited to whether section 6(b)(5) imposed a cost-benefit analysis. *ATMI*, 452 U.S. at 512 ("We need not decide whether § 3(8), standing alone, would contemplate some sort of cost-benefit analysis."). Notwithstanding that limitation, the Court reviewed the entire Act and its legislative history and found Congress did not specifically define the term "feasible". *See id.* at 511, 514 ("These and other statutes demonstrate that Congress uses specific language when intending that an agency engage in cost-benefit analysis."). Accordingly, the Court accorded the term its plain and ordinary meaning, which is "capable of being done." *Id.* This was also recognized by Commissioner Cleary, who was in the majority in *Sun Ship* but found himself dissenting in *Sherwin-Williams*:

> *Sun Ship* is predicated on a basic rule of statutory construction: regulations are to be construed consistent with the statutes under which they are promulgated and when terms are not defined in their regulatory context they must be interpreted in accord with underlying Congressional purpose. *United States v. American Trucking Associations*, 310 U.S. 534, 542 (1940). Moreover, unless a different intent is clearly evident, the same statutory terms are to be given the same meaning, *Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723 (9th Cir. 1979) (and cases cited therein), and regulatory language should be given the same meaning as the same language appearing in the statute. *See Baroid Div. of N.L. Industries, Inc. v. OSHRC*, 660 F.2d 439, 447 (10th Cir. 1981), and *RMI Co. v. Secretary of Labor*,

> 594 F.2d 566 (6th Cir. 1979) (in which the statutory and regulatory uses of "feasible" are viewed as synonymous).

Sherwin-Williams, 1984 WL 34904 at *10 (Cleary, Comm'r., dissenting).

Second, with the exception of *Castle & Cooke, supra*, the circuit court cases approving the cost-benefit analysis of *Continental Can* were decided prior to *ATMI*. *See Sherwin-Williams*, 1984 WL 3904 at *5 (citing *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801 (9th Cir.1981); *Int'l Harvester Co. v. OSHRC*, 628 F.2d 982 (7th Cir.1980); *RMI Co. v. Sec'y of Labor*, 594 F.2d 566 (6th Cir.1979); *Marshall v. W. Point Pepperell, Inc.*, 588 F.2d 979 (5th Cir.1979); *Turner Co. v. Sec'y of Labor*, 561 F.2d 82 (7th Cir.1977)). As for *Castle & Cooke*, Commissioner Cleary adroitly pointed out that (1) the Ninth Circuit began its analysis "from a presumption of deference" to the Commission; (2) along similar lines, the court held only that *ATMI* did not *require* the Commission to abandon cost-benefit considerations; and (3) "the fact that there are different types of OSHA standards simply does not bear on the question of the meaning of feasibility" and, therefore provides "no basis for grafting cost-benefit onto the term, whether the Act provides for one type of standard or a hundred." *Sherwin-Williams*, 1984 WL 3904 at *11.

Third, the Commission's discussion of the legislation underlying §1910.95(b)(1)—the Walsh-Healey Act—in *Sherwin-Williams* is light on analysis and heavy on inference. The Commission majority starts with a discussion of the Walsh-Healey Act and its purpose and then veers into an odd narrative, devoid of legal citation or analysis, regarding the calculus contractors engage in when constructing a bid for government contracts. *See*, 1984 WL 3904 at *6 ("While the Walsh-Healey background of the noise standard *does not reflect any regulative or adjudicative history* suggesting the intent of its redactors, it is possible to reach some conclusions about what was understood by the word "feasible.") (emphasis added). Based on that narrative, the Commission constructed its rationale for the necessity of a cost-benefit analysis. With the benefit

of hindsight, we now know it is improper for the Commission to supplant its own interpretation for that of a reasonable interpretation espoused by the Secretary. The Court finds the criticism levied by Commissioner Cleary strikes at the heart of the *Sherwin-Williams'* majority analysis: "The *Sun Ship* Commission made no "reasonable assumptions" of what government contractors consider cost-effective. The Supreme Court has said that a regulatory word is to be given its dictionary meaning unless Congress intends otherwise. The ruminations of a mythical government contractor cannot substitute for the rule of law." *Id.* at *11 n.3.

In addition to Commissioner Cleary's criticism, it should be noted *Castle & Cooke*, as well as the other circuit court decisions approving of the Commission's cost-benefit analysis, came before the Supreme Court's decision in *Martin v. OSHRC* (*CF&I*), 499 U.S. 144 (1991) (finding Congress "did not expect the Commission to possess authoritative interpretive powers" and holding "the Commission is authorized to review the Secretary's interpretations *only* for consistency with the regulatory language and reasonableness") (emphasis added). Thus, any deference circuit courts may have granted to the Commission's interpretation of the term was undue and suggests the cost-benefit approach is no longer good law.

B. Feasibility & The General Duty Clause

It is hard to pin down the meaning of "feasibility" beyond the broad definition used by the D.C. Circuit in *National Realty*, which continues to be cited as the standard against which the Secretary's burden is measured under the general duty clause. *See, e.g., United States Postal Svc.*, No. 16-1713, 2023 WL 2263313 at *7 (OSHRC, Feb. 17, 2023) (consolidated). In *National Realty & Construction Co. v. OSHRC*, the D.C. Circuit established the Secretary's obligation to prove feasibility as part of a general duty clause violation. *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973) (holding the Secretary must establish "demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have

occurred"). Even though cited multiple times for many different propositions, *National Realty's* holding regarding feasibility in the context of the general duty clause was not adopted by the Commission until three years later in *Cormier Well Service*, No. 8123, 1976 WL 5945 (OSHRC, Apr. 6, 1976) (finding Secretary established feasible steps were available to the employer to reduce the hazard).[4] The Tenth Circuit Court of Appeals also adopted the concept of economic feasibility in the context of a general duty clause violation. *See Baroid Div. of NL Indust., Inc.*, 660 F.2d 439 (10th Cir. 1981) ("The Supreme Court recently has made clear that "feasible" for purposes of OSHA means economically and technologically capable of being done." (citing ATMI, 452 U.S. 490, *supra*)).

While *National Realty* and *Baroid* require the Secretary to establish feasibility as part of her *prima facie* burden, neither provides much clarity as to the appropriate metric for the *economic* half of that analysis. The discussion of economic feasibility in *National Realty* is almost wholly contained in a footnote, wherein the D.C. Circuit stated:

> Similarly, a precaution does not become infeasible merely because it is expensive. But if adoption of the precaution would *clearly threaten the economic viability of the employer*, the Secretary should propose the precaution by way of promulgated regulations . . . rather than through adventurous enforcement of the general duty clause."

Nat'l Realty & Constr., 489 F.2d at 1268 n.37 (emphasis added).[5] *Baroid* is equally light in its analysis of economic feasibility. In *Baroid*, the 10th Circuit cited *ATMI* for the proposition that "feasible" means "economically and technologically capable of being done", but its analysis of the

4. Administrative Law Judge John J. Morris appears to have issued the first decision referencing the general duty clause that ended up before the Commission; however, the Secretary ultimately withdrew its petition for review "because of the inability to meet the burden of proof required by *National Realty*." *Getter Trucking, Inc.*, No. 2701, 1974 WL 4078 at *1 (OSHRC, Apr. 29, 1974).

5. As noted by the Commission, "As with other aspects of the general duty clause, Judge J. Skelly Wright's comments on economic feasibility were obiter dictum; however, Judge Wright's comments have invariably served as authoritative rules in a number of subsequent cases decided by various Courts of Appeals." *Inland Steel Co.*, No. 79-3286, 1982 WL 153528 at *11 n.17 OSHRC, Apr. 7, 1982) (emphasis in original) (citing *Nat'l Realty*, 489 F.2d at 1266 n.37).

evidence on the issue of economic feasibility is limited to a simple statement that "the record suggests that the fourth method is not economically capable of being done." *Baroid*, 660 F.2d at 447.[6]

What does it mean for an abatement proposal to be "economically . . . capable of being done"? The D.C. Circuit (in *dicta*) indicated an employer would be economically capable of implementing an abatement proposal if its adoption would not "clearly threaten the economic viability of the employer . . . ." *Nat'l Realty*, *supra*. In *Waldon Healthcare Group*, the Commission attempted to compile "factors" it believed were germane to that assessment:

> One of the criteria for determining whether a proposed measure of abatement is feasible is whether the proposed measure is cost prohibitive. *General Dynamics,* 15 BNA OSHC at 1287, 1991 CCH OSHD at p. 39,759. Under the general duty clause, an employer is not required to adopt measures that would threaten its economic viability. *National Realty,* 489 F.2d at 1266 n. 37. One issue to consider when determining whether abatement is economically feasible is whether the cost of compliance would jeopardize a company's long-term profitability and competitiveness. *Sun Ship, Inc.,* 11 BNA OSHC 1028, 1033, 1983–84 CCH OSHC ¶ 26,353, p. 33,421 (No. 16118, 1982). Another factor relevant to that consideration is whether the employer can pass the costs on to the customer. *Walker Towing Corp.,* 14 BNA OSHC 2072, at 2077 n. 9, 1991 CCH OSHD ¶ 29,239, p. 39,161 n. 9 (No. 87–1359, 1991).

Waldon Healthcare Grp., No. 89-2804, 1993 WL 119662 at *15.

At a minimum, the above analysis implies economic feasibility is the ability of the employer *in this case* to afford what the Secretary says is required; cost alone is not sufficient to establish feasibility. *See id.* (holding Secretary failed to establish economic feasibility when it presented evidence of cost but failed to provide evidence of profits or financial condition of the employer). For some courts, that requires a multi-year, comprehensive look at the company's

6. The "fourth method" in question required the employer to monitor the mud men at each drilling site that meets certain qualifications. The court determined this method was not economically capable of being done because "the record reflects that every mud man works at several drilling sites in a given period of time and that petitioner employs numerous mud men." *Baroid*, 660 F.2d at 447. Without a more in-depth discussion of cost or the employer's ability to afford the proposed method, however, it is unclear why the logistical issues associated with monitoring mud men is *economically* infeasible.

financial picture. *See Smith Steel Casing Co. v. Brock*, 800 F.2d 1329, 1339 (5th Cir. 1986) (rejecting ALJ's finding of economic feasibility based on evidence of a single year of income and profits because it was unclear if that year was typical for the purpose of assessing whether the proposal would threaten the employer's economic viability). Thus, the question is not merely whether Respondent can afford implementing a proposed form of abatement, but whether the cost associated with it "would jeopardize [its] long-term profitability and competitiveness." *See Waldon*, 1993 WL 119662 at *15.[7] Accordingly, in most cases, the Commission and circuit courts rely on expert financial/economic testimony. *See United States Postal Svc.*, 2023 WL 2263313; *Beverly Enters., Inc. d/b/a Richland Manor*, No. 91-3144, 2000 WL 34012177 (OSHRC, Oct. 27, 2000) (consolidated).

As argued by the Secretary, however, there are instances where the Commission and courts have found economic feasibility without evidence of cost or ability to pay. In those cases, it appears the Commission and courts have been guided in a manner similar to the Ninth Circuit in *Castle & Cooke*, which stated, "[R]ealism and common sense should dictate how the Secretary may meet his burden of providing substantial evidence of feasibility." *Castle & Cooke Foods*, 692 F.2d at 650. *See also Chao v. Gunite Corp.*, 442 F.3d 550, 559 (7th Cir. 2006); *Sherwin Williams*, 1984 WL 34904 at *7. For example, the D.C. Circuit determined substantial evidence supported an ALJ's finding that the Secretary's proposed abatement was feasible as a general proposition, because the employer had already "implemented many of these measures on its own." *SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1215 (D.C. Cir. 2014); *see also Science Applications Int'l Corp.* (*SAIC*), No. 14-1668, 2020 WL 1941193 at *8 (OSHRC, Apr. 16, 2020). The First Circuit found

7. In *Waldon*, the Commission held one factor to consider in making this determination is whether the cost can be passed along to the customer. *Id.* There was no evidence regarding transferring costs or income on a patient-by-patient basis, rendering this factor moot.

the Secretary had proved its abatement method was feasible, because the ANSI standard upon which it was based had been in effect for nearly 60 years and because other owners of similar equipment had implemented the proposed abatement. *See Puffer's Hardware, Inc. d/b/a Beacon Hardware v. Donovan*, 742 F.2d 12, 19 (1st Cir. 1984).

Along similar lines, the Seventh Circuit held the Secretary's abatement proposals were economically feasible when it found "the Company's previous use or contemplated use of a protective mechanism indicates a sufficient level of economic feasibility." *Modern Drop Forge, Co. v. Sec'y of Labor*, 683 F.2d 1105, 1114 (7th Cir. 1982). The court also found "the fact that other companies having similar hammers comply with the regulation indicates that it is feasible." *Id.* at 1114.[8] In *Coastal Drilling East, LLC*, a Commission ALJ found the Secretary's proposed abatement measures were economically feasible in the absence of any evidence of cost, because "it is reasonable to infer the cost of developing SOPs that include training and observation would be minimal, capable of being done, and not at all threatening to the economic viability of [the employer]." *Coastal Drilling East, LLC*, No. 17-1179, 2019 WL 7080227 at *7–8 (OSHRCALJ, Dec. 13, 2018). Recently, the Commission provided an additional way for economic feasibility to be established without evidence of cost or ability to pay. *See UHS Delaware*, *supra* at *4–5. The Commission held Respondent's failure to challenge the economic feasibility of 6 out of the 8 proposed forms of abatement, in effect, constituted a concession that *all* abatement proposals were feasible, because it only takes proof of a single form of abatement to establish the existence of a violation when those forms of abatement are alleged *as a process*. *Id.*

8. In discussing "previous or contemplated use", the Seventh Circuit was likely referring to the ALJ's finding of fact that the employer had previously experimented with an abatement method similar to that proposed by the Secretary but only abandoned it after receiving employee complaints. *See Modern Drop Forge Co.*, (No. 76-331, 1981 WL 19333) (OSHRCALJ, Apr. 9, 1981).

Respondent's principal argument against a finding of economic feasibility is that Complainant failed to provide any evidence whatsoever of the cost of the proposed abatements or of Respondent's ability to pay. While there are cases, such as *Beverly Enterprises, Inc.* and *Smith Steel Casting Co.*, which involved extensive expert economic testimony, there are other cases that do not reference such evidence at all. Respondent attempts to distinguish *Beverly* and *Smith Steel* by pointing out the cases cited by Complainant do not directly address the question of economic feasibility. For example, Complainant cites to *SAIC* and *SeaWorld*, wherein the Commission and the D.C. Circuit, respectively, determined the proposed abatement was feasible because the employer had already implemented it. *See SAIC*, 2020 WL 1941193 at *8; *SeaWorld of Florida, LLC*, 748 F.3d at 1215. Respondent contends these cases are inapplicable because the employers in those cases did not challenge *economic* feasibility.

Notwithstanding the employers' failure to specifically challenge economic feasibility, the Court nonetheless finds the Commission's and D.C. Circuit's conclusions as to feasibility, as a general matter, apply with equal force to both economic and technological feasibility. This is a matter of common sense: if a company implements a proposed form of abatement, then its implementation would not "clearly threaten [its] economic viability". *Nat'l Realty*, *supra*. As such, it falls in line with the Ninth Circuit's admonition that "realism and common sense should dictate how the Secretary may meet his burden of providing substantial evidence of feasibility." *Castle & Cooke Foods*, 692 F.2d at 650.

The foregoing establishes three things. First, the Secretary is required to prove the economic feasibility of her proposed abatement measures. Second, the standard for economic feasibility is broad, requiring only proof that the abatement proposal will not "clearly threaten the economic viability of the employer . . . ." *Nat'l Realty*, *supra*. Third, there are instances where the

Secretary can meet that burden of proof without evidence of the cost of those measures or of the employer's ability to pay for them.

IV. Analysis

To recap, Complainant proposed the following measures as a process to abate the hazard of workplace violence:

(1) reconfiguring nurse stations to prevent patients from entering and using items as weapons;
(2) providing communication devices to all staff members;
(3) developing "one written comprehensive" workplace violence prevention program;
(4) designating qualified staff to monitor for potential patient aggression and respond to violent events;
(5) communicating workplace violence incidents to all employees;
(6) training staff who may come into contact with patients;
(7) investigating and debriefing affected staff after each workplace violence incident;
(8) "[e]nsur[ing] safe staffing levels across all shifts to ensure adequate staff coverage for behavioral emergencies"; and
(9) "[e]valuat[ing] and . . . replac[ing] or redesign[ing] furniture to assure that it cannot be used as a weapon."

See UHS of Denver, Inc., d/b/a Highlands Behavioral Health Sys., No. 19-0550, 2022 WL 17730964 at *1, n.3 (OSHRC, Dec. 8, 2022).[9]

Complainant argues she established the foregoing abatement methods were economically feasible because (1) they only require minor modifications to existing practices; (2) Respondent need only implement what it already claimed to be doing; (3) Respondent has already implemented several of the proposals; and (4) similarly situated employers have implemented those same proposals. Although Respondent did not introduce any countervailing evidence to suggest the foregoing process, or any element thereof, was infeasible, it contends Complainant failed to meet its burden of proof to establish its *prima facie* case. Specifically, Respondent contends: the

9. As noted in this Court's *Order on Remand*, dated January 10, 2023, Complainant originally alleged ten abatement proposals as part of the process to abate workplace violence; however, Judge Ball determined one, continuous monitoring of security cameras, would not be materially effective. *See UHS of Denver, Inc., d/b/a Highlands Behavioral Health Syst.*, No. 19-0550, 2022 WL 17730964 at *39 (OSHRC, March 1, 2022) (citing reference made to ALJ decision, which is appended to the end of Commission Decision and Remand on Westlaw).

foregoing arguments are not supported by case law, the cases relied upon by Complainant are distinguishable on the facts, and the circumstantial evidence Complainant relies upon (in lieu of proof of cost and ability to pay) is insufficient to establish *economic* feasibility. The Court will address these arguments in the context of each of the proposed abatement methods.

A. Reconfiguring Nurse's Stations

Complainant contends modifying the existing nurse's stations is economically feasible on two bases. First, Complainant presented evidence from multiple former employees, who testified their current employers had enclosed nurse's stations, which Complainant argues illustrates its feasibility. In support, Complainant cites *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 19 (1st Cir. 1984), wherein the court found the proposed abatement was economically feasible because other employers had implemented the same measure. *See also Modern Drop Forge*, 683 F.2d at 1114, *supra*. As such, the court determined it was reasonable to infer economic feasibility due to the industry standard's longstanding vitality. *Puffer's Hardware, Inc.*, 742 F.2d at 19. Respondent contends Complainant's reliance on *Puffer's* is misplaced because the ANSI standard upon which the proposed abatement was based had been in place for nearly 60 years, which is considerably longer than the current iteration of the Guidelines for Preventing Workplace Violence for Healthcare and Social Service Works has been available.

Puffer's provides an interesting illustration of the issue currently before the Court. While the Court agrees the First Circuit's assessment of the abatement in *Puffer's* was premised, at least in part, on the fact that it had been long-established as an ANSI standard, the court also noted its conclusion is "further supported by the evidence that other owners of similar elevators had converted their elevators." *Id.* In other words, it was not the existence of the long-standing standard, alone, which established economic feasibility, but also its adoption by other, similarly

situated employers. When viewed in this light, this makes Complainant's case more compelling, but is not sufficient in and of itself.

Second, Complainant argues Respondent showed the reconfiguration was economically feasible because it was in the process of raising the counter height in one unit while the trial was pending. (Tr. 3293). Respondent's principal response to this argument is that Complainant "contends that all the nurses' stations must be reconfigured and that modifications beyond raising the counter height are required." *Resp't Suppl. Br.* at 4. And, because Complainant did not introduce any evidence of cost or ability to pay, there is no proof that reconfiguring every nurse's station would be feasible. *Id.* at 4–5. The Court is not persuaded by this argument.

In *SeaWorld*, the employer had already implemented the proposed form of abatement as to one whale, and the D.C. Circuit determined it was feasible to apply that abatement to all human-whale training interactions. 748 F.3d at 1215. Complainant is asking no more of Respondent in this case than to equally apply abatement measures where the hazard has been identified, which, according to the Court's count, includes three units.[10] Irrespective of evidence of cost, Respondent has itself shown a design modification intended to "prevent patients from jumping over, reaching into or over or otherwise entering into the workstations" was not detrimental to its long-term viability, because it was being modified at the time of trial. *Citation and Notification of Penalty* at 6.

Because Respondent modified the nurse's station in at least one of the three areas within the facility, the Court finds it is reasonable to infer similar modifications are "capable of being done" to the other areas without impacting Respondent's viability. *See Okland Const. Co*., No.

10. The evidence showed most of the violent interactions occurred in the high-acuity and adolescent units. A workplace violence assessment, as required by the WVPP, may show such interventions are not necessary in all three units.

3395, 1976 WL 5934 (OSHRC, Feb. 20, 1976) (reasonable inferences can be drawn from circumstantial evidence).

B. Communication Devices

The arguments about the nurse's station are equally applicable to Complainant's proposal that Respondent "[p]rovide all staff members with a reliable and readily available communication device, such as a walkie-talkie or panic alarm button . . . ." *Citation* at 6. According to Thomas Braswell, who was responsible for purchasing equipment for Respondent, not only did he purchase enough radios for each employee in the units to have a radio on them at all times, but Respondent instituted a policy requiring it. (Tr. 3358-3360). This definitively establishes Complainant's proposed abatement is both technologically and economically capable of being done—because it was done. *Baroid*, 660 F.2d 439.

C. Comprehensive Workplace Violence Prevention Program

With respect to the WVPP, Complainant has not required Respondent to do something it was not already required to do, or, for that matter, something it was not already doing. The evidence illustrates Respondent had a WVPP, albeit one that was deficient in many respects, according to expert testimony. As found by Judge Ball, Respondent did not need to institute a completely new program. More than anything, Respondent's program required a shift in focus. For example, Dr. Lipscomb testified Respondent's program lacked a consistent definition of workplace violence, which, in turn, impacted Respondent's ability to effectively track and respond to it. (Tr. 3655, C-62 at 25). Thus, Dr. Lipscomb testified Respondent needed to review and modify its program to account for this deficiency. As it turns out, Respondent is already required to perform an annual review and implement modifications based on that review. (Ex. C-11 at 8). Not only does Respondent have the framework of the proposed abatement, but the plan itself contemplates constant review and revision of its provisions based on hazard, illness, and injury

trends identified through various data collections, i.e., OSHA 300 Logs, Post Incident Debriefings, and Employee Accident Reports. *Id.*; *see also Modern Drop Forge, Co.*, 683 F.2d at 1114 ("[T]he Company's previous use or contemplated use of a protective mechanism indicates a sufficient level of economic feasibility."). Modifications, such as those suggested by Dr. Lipscomb, are already built into Respondent's existing WVPP as part of its annual review process. Complainant is asking no more of Respondent than it already requires of itself, even if Respondent's execution of the plan left something to be desired. Accordingly, the Court finds this proposed abatement method is economically feasible.

D. Communicating Workplace Violence Incidents

Whether viewed individually, or in conjunction with the foregoing abatement proposals, the Court finds Complainant's proposed enhancements to its existing regime of communicating workplace violence incidents would not impact Respondent's long-term financial viability and, thus, is economically feasible. This abatement flows naturally from Complainant's proposed modifications to the WVPP, which include an expanded definition of workplace violence and employer commitment to meaningful employee participation. As noted by Dr. Lipscomb, employee participation is a vital aspect of a WVPP and can only be realized by including employees in programs and committees designed to reduce workplace violence. (Tr. 3643, 3756). As with the proposed modifications to the WVPP, Complainant is not really asking Respondent to do anything it is not already doing (or says it is doing, according to policy). As noted by Judge Ball, "Respondent has policies regarding the exchange of information from intake to the unit, between shifts on a particular unit (shift handoff reports), and through meetings/committees such as the PIC, PSC, and treatment team meetings." *UHS – Highlands*, 2022 WL 17730964 at *42; *see also id.* at *19-20 (identifying the various documents, committees, and meetings used to discuss workplace violence). The Court finds it is economically feasible to utilize existing

information and policies to collect information, while simultaneously using existing committees and programs to more effectively carry out the stated purpose of a WVPP.

E. Training Staff

As with the previous two abatement proposals, Respondent has an existing training framework, which includes orientation and regularly scheduled competency fairs "where employees sign up for refresher training and develop practical skills." *Id.* at *22. Based on this Court's reading of the record, Respondent's failures vis-à-vis training were twofold: (1) failing to train on the WVPP and linking training, such as Handle With Care, to the WVPP; and (2) failing to properly track and ensure training was implemented on a per-employee basis. As with the Court's discussion regarding the communication of workplace violence incidents, this abatement proposal also arises out of the proposed modifications to the WVPP. A program which requires annual modifications to address the hazard of workplace violence will also require equivalent modifications to its training program to appropriately address those hazards. (Ex. C-11).

The modifications proposed by Complainant require no more of Respondent than to train its employees on the WVPP[11] and to use its existing training regime to show how other policies are connected to it. Respondent's competency fairs, through which employees receive refresher or periodic training, are custom-built for the implementation of Complainant's proposal. The framework for providing such training already exists. Respondent need only provide training specific to its comprehensive plan to prevent workplace violence and connect the plan's principles to Respondent's existing regimen of training designed for that same purpose. Complainant is not seeking anything new here. It is entirely consistent with Respondent's pre-existing, self-imposed obligation to perform an annual review "to assure that the facility is implementing corrective

11. Respondent claimed to do this, but the weight of the evidence indicates otherwise. (Tr. 137, 845, 988, 1150, 3341).

actions that are capable of effective and sustainable hazard elimination and/or control." (Ex. C-11 at 8). Within Respondent's then-existing WVPP, that included "Staff Education, Training & Competency" as a "core principle" for preventing workplace violence. *Id.* at 1.

The Court finds providing training specific to its WVPP and connecting that training to other courses related to workplace violence within the framework described above will not "clearly threaten the economic viability of" Respondent. *Nat'l Realty & Constr.*, 489 F.2d at 1268 n.37. Accordingly, the Court finds this abatement proposal is economically feasible.

F. Investigating and Debriefing Affected Staff After Workplace Violence Incidents

Like many of the abatement proposals discussed above, this proposal is connected to Complainant's proposed changes to the WVPP. And, for many of the same reasons, the Court finds this proposal would be economically feasible. Respondent's program already requires post-incident debriefing for patient aggression incidents resulting in restraint or seclusion. (Tr. 163-64, C-11, C-40 to C-49). Respondent also claims it conducts similar debriefing after each incident of patient-on-employee violence that does not involve restraint or seclusion.[12] Respondent's true issue with this proposal was the inclusion of so-called "near-misses" as part of its debrief and investigation process. But, all the experts, including Respondent's own Dr. Cohen, testified that "'situation[s] that could potentially have resulted in death, injury, or illness', should be investigated, reported, recorded, and monitored." (Ex. 65 at 12, 29). Thus, Respondent is only being asked to consistently apply a program it already has and to include within its ambit events that had the potential to result in death, injury, or illness (but did not). Considering Respondent claimed to be providing training using a definition of workplace violence that would include

12 This was disputed by Respondent's employees, and there is no documentation to establish whether this claim is true; however, that is not relevant to the question of economic feasibility. The fact that Respondent has an existing program for debriefing incidents of patient aggression and conducting investigations of such incidents, however, is.

near-misses, the economic impact of the foregoing change would appear to be *de minimis*, at best. (Ex. C-12 at 3). That all three experts testified to the importance of the foregoing aspects of a WVPP further bolsters this conclusion. *See Puffer's*, 742 F.2d 12, *supra*.

G. Evaluating and Replacing/Redesigning Furniture

As with the proposal regarding the purchase of sufficient radios to ensure each employee on the unit has one, Respondent illustrated the economic feasibility of this proposal through its own actions. Jill Orr, former chief nursing officer for Respondent, testified that, after the inspection, Respondent had purchased additional weighted furniture and found ways to increase the weight of some of its existing furniture to reduce the likelihood it would be used to injure other patients or staff. (Tr. 2887). In so doing, Respondent illustrated this method is both technologically and economically capable of being done. Accordingly, the Court finds this abatement proposal is economically feasible.

H. Ensuring Safe Staffing Levels

Complainant argues she established the economic feasibility of the staffing related measures "through expert testimony and evidence regarding Respondent's own practices." *Compl't Suppl. Br.* at 5. Regarding whether staffing was adequate, Complainant focuses on Respondent's "previous use or contemplated use" of additional staff members to illustrate the economic feasibility of adding more staff. *Id.* (citing *Modern Drop Forge Co.*, 683 F.2d at 1114). In particular, Complainant points out that, in those instances where Respondent did not have enough staff called for by the staffing matrix, Respondent could offer bonuses to pick up an extra shift, house supervisors could bring in additional staff without permission, and schedulers did not need approval of senior management to staff above the matrix. (Tr. 3231–3233, 3546–3547). Further, Complainant points out that Respondent's parent company sent a divisional nursing director, who also recommended additional staffing to keep employees safe. (Ex. C-25 at 5).

When compared to the abatement measures discussed above, the evidence in support of the economic feasibility of additional staffing is lacking. On its face, having programs to compensate employees for coming in to cover shifts or provide additional staffing when needed indicates *some* funds are available to address staffing over and above the base levels established in the staffing matrix. However, these are stopgap measures and do not address the economic realities of hiring multiple, full-time employees, whose cost must be budgeted for in terms of salary, benefits, training, and other associated expenses. The Court is without any evidence as to how much Respondent paid in bonuses, overtime, or additional shifts, nor is it aware of how often such payments were made. There is no evidence of how much a single, let alone multiple, full-time employee(s) would cost relative to Respondent's stopgap staffing measures. Without such evidence, Complainant's reliance on those stopgap measures as proof of economic feasibility is misplaced.

Further, unlike the other measures discussed above, there is no alternative, non-economic evidence sufficient to establish economic feasibility. Though not specifically argued by Complainant with respect to this abatement proposal, there was evidence the staffing ratios changed after the inspection took place. Lori Ayala, a house supervisor for Respondent, testified the staffing matrix used at trial was outdated and that more employees would be present when the patient census approached an equivalent level in the new matrix. (Tr. 3285-3286; Ex. C-16). On cross-examination, however, Ayala also testified the facility changed from three eight-hour shifts to two twelve-hour shifts, which changed how employees were allocated on a day-to-day basis but not the patient-to-employee ratio. (Tr. 3539-3540). The evidence of changing staff numbers is equivocal, at best. Accordingly, the Court finds Complainant failed to prove additional staffing would be economically feasible.

I. Designating Staff to Monitor for and Respond to Patient Aggression

With respect to this form of abatement, Complainant suggests expert testimony provided by Drs. Lipscomb and Argumedo, as well as Dr. Cohen, establish its economic feasibility. In particular, Complainant argues their testimony, as well as that of former employees, established other facilities have successfully implemented dedicated security guards. Thus, Complainant argues, because the use of dedicated security staff was "capable of being put into effect" in other locations, it must therefore be economically and technically feasible. While these measures were capable of being put into effect in other places, the Court is concerned about this location and whether Complainant has established, on some basis other than cost, that additional, dedicated security staff is economically feasible *for Respondent*. *See UHS of Delaware*, *supra* at *17 (Comm'n. Laihow, concurring) (finding unpersuasive Secretary's evidence that other facilities used similar abatement because record lacked evidence indicating facilities are similar in type, size, function, or impact of staffing costs). The Court finds neither the facts, nor the law cited by Complainant support that conclusion.

Complainant conflates economic and technological feasibility. While there are some circumstances where proof of one is sufficient to prove the other, that is not necessarily the case. As illustrated multiple times above, implementation of an abatement proposal *by this employer* after the inspection shows it is technologically capable of being implemented, because they implemented it. But, it also illustrates economic feasibility, because the abatement was not so financially ruinous as to prevent Respondent from implementing it. That evidence is not present here. Instead, Complainant invites the Court to take an inferential leap and find Respondent is financially capable of hiring dedicated security guards merely because another institution has done so. This is where Commissioner Laihow's concerns come to fruition.

Evidence that another institution could implement a form of abatement may, on its own, show technological feasibility; however, such proof only shows *that institution* was able to afford it. The general duty clause is a special standard, so to speak. It permits the Secretary to pursue an employer for a unique failure to protect its own employees. Thus, it is incumbent upon the Secretary to provide evidence *this employer* can afford the specific, non-promulgated recommendations of the Secretary. *See Nat'l Realty & Constr.*, 489 F.2d at 1268 n.37 (emphasis added) ("But if adoption of the precaution would *clearly threaten the economic viability of the employer*, the Secretary should propose the precaution by way of promulgated regulations . . . rather than through adventurous enforcement of the general duty clause.") (emphasis added).

There is very little evidence of similarity between Respondent's facility and any of the institutions described in the Road Map, nor is there evidence of Respondent consistently employing a dedicated security staff. It is true, Respondent employed the so-called QSR float staff for a while to address the very concerns at issue in this case. (Tr. 1143, 2342). That fact established the technological feasibility of such a measure; however, the evidence for why the program no longer exists cuts against Complainant's argument for economic feasibility. According to Jill Orr, the QSR program was eventually cut due to "budgetary constraints". (Tr. 2344-2345). There was no evidence to contradict this claim.

Complainant's reliance on First Judge Augustine's decision in *UHS of Centennial Peaks LLC* is misguided, as well. Complainant argues First Judge Augustine found similar abatement measures were economically feasible because "as illustrated in the Road Map, most, if not all, of the [] abatement measures have been implemented in facilities like Respondent's throughout the country." *UHS Centennial Peaks LLC*, No. 19-1579, 2022 WL 4075583 (OSHRCALJ, July 14,

2022), *appeal docketed*, No. 22-9572 (11th Cir. Oct. 26, 2022).[13] That factor was a tack-on to three sound bases upon which to find economic feasibility: (1) many abatements only required a change in policy, documentation, or practice; (2) Respondent implemented many of the abatement proposals, including additional staffing, after the inspection occurred; and (3) Respondent failed to provide countervailing *economic evidence* to undermine the testimony of its own CFO that it could afford additional staff or modifications to the nurse's station. None of those factors are present here.

Based on the foregoing, the Court finds Complainant failed to prove the implementation of a dedicated security staff was economically feasible.

V. Conclusion

As argued by Respondent, the Guidelines published by OSHA are not standards nor do they alter existing obligations. However, that is not the issue here; rather, the Court was asked whether the proposals are economically feasible. The Guidelines' status as an advisory document does not alter Respondent's obligation to address recognized hazards at its worksite, irrespective of the source of the proposed abatement methods. It is not Respondent's failure to implement specific forms of abatement that is the basis of the Citation; rather, it is the overwhelming evidence of workplace violence and Respondent's insufficient attempts to address it. The proposed forms of abatement are not requirements in and of themselves; however, to the extent Respondent has a workplace violence problem it needs to address, Complainant can use the Guidelines as recommended means to abate that hazard.

Along those same lines, however, Commissioner Laihow's concerns regarding the Commission's obligation to vet individual abatement proposals become particularly acute when

13. This matter was ultimately settled by the parties prior to it being decided by the Tenth Circuit.

the Secretary proposes multiple forms of abatement as part of a process, as was the case here. In such a case, the Commission is not only being asked whether Respondent can afford one form of abatement but a series of abatement proposals. With respect to those proposals, courts must address a host of questions involving the affordability of those proposals and the scope of their implementation. These questions become difficult to answer if Complainant is only required to establish the feasibility of a single form of abatement. Further, it provides the Secretary with an unqualified tactical advantage to plead a series of abatement measures as a process and only require proof of the feasibility of one to establish a violation.

Nevertheless, consistent with existing Commission precedent, the Court finds Complainant established a violation of the general duty clause. Complainant established seven out of the remaining nine forms of abatement are economically feasible, which is sufficient to prove a violation. *See UHS of Westwood Pembroke, Inc., UHS of Delaware, Inc.*, 2022 WL 774272 at *8 (OSHRC 2022) *aff'd,* No. 22-1845, 2023 WL 3243988 at *1, fn. 2 (3d Cir. May 4, 2023) (Third Circuit affirming the Commission on this specific point of law). Accordingly, the Citation is AFFIRMED.

VI. ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED and a penalty of $11,934 is ASSESSED.

SO ORDERED.

/s/

Dated: June 1, 2023
Denver, Colorado

Joshua R. Patrick
Judge, OSHRC